Pantelis Michalopoulos 202 429 6494 pmichalo@steptoe.com



1330 Connecticut Avenue, NW Washington, DC 20036-1795 202 429 3000 main www.steptoe.com

June 11, 2013

FILED IN ECFS

Marlene H. Dortch Secretary Federal Communications Commission 445 Twelfth Street, SW Washington, DC 20554

Re: IB Docket No. 12-343; Sprint Nextel Corp. and SoftBank Corp., Joint Application for Consent to Transfer International and Domestic Authority

Dear Ms. Dortch:

DISH Network Corporation ("DISH") responds below to the efforts by Sprint Nextel Corporation ("Sprint") and SoftBank Corporation ("SoftBank") to side step the question as to whether Sprint already exercises *de facto* control over Clearwire Corporation ("Clearwire") and its implications for the effectiveness of the National Security Agreement ("NSA") reached with the U.S. security agencies.<sup>1</sup>

Importantly, in their June 9 letter to the Commission, Sprint and SoftBank appear to acknowledge by their silence that the NSA is premised on the notion that Sprint lacks operational control over Clearwire today; <sup>2</sup> as a result, if SoftBank acquires control over Sprint, and Sprint's current rights in Clearwire are not expanded, then the requirements for the decommissioning of certain Chinese-manufactured equipment and the review of new equipment purchases under the NSA would not be triggered. But Sprint's extensive rights in Clearwire make that central notion questionable both under the Commission's own control analysis and the standard applicable under the national securities laws.

<sup>1</sup> See Letter from Sprint Nextel Corp. and SoftBank Corp., Starburst I, Inc., and Starburst II, Inc., to Marlene H. Dortch, Secretary, FCC, IB. Docket No. 12-343 (June 9, 2013) ("Letter") (in part responding to the DISH letter filed June 4, 2013 in the same docket); Letter from Pantelis Michalopolous, Counsel to DISH Network Corp., to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-343 (June 4, 2013) ("DISH Letter").

<sup>&</sup>lt;sup>2</sup> See Letter at 2-3 (taking the position that Sprint does not now possess *de facto* control over Clearwire).

Marlene H. Dortch June 11, 2013 Page 2



Commission Standard. Under Commission precedent, a party may be found to possess de facto control over a licensee if it has the power to direct the day-to-day affairs of the licensee, even if the party possesses neither a majority equity interest nor a right to appoint a majority of the licensee's board of directors. Sprint, of course, has both; it owns the majority of Clearwire's stock and appoints the majority of Clearwire's directors—7 out of 13, none of whom, after the Eagle River transaction, has to be independent. Certainly, there are measures that an entity may employ to insulate itself from a finding of de facto control. But neither Sprint nor SoftBank have yet identified any such measures here.

Instead, Sprint and SoftBank merely point to a January 2013 filing by Clearwire that focused exclusively on certain extraordinary rights reserved for the remaining independent directors on Clearwire's board (such as the right to approve company sales or mergers). But the reservation of such rights for independent directors is simply a minority shareholder protection that the Commission has found repeatedly falls short of conferring *de facto* control on its holders. It says nothing about whether *Sprint* enjoys the ability to direct the day-to-day affairs of Clearwire, abilities that are the core of the Commission's *de facto* control analysis. Given Sprint's majority equity position and majority board participation in Clearwire, it is incumbent on SoftBank and Sprint to explain why *de facto* control does not exist.

*CFIUS Standard*. Sprint and SoftBank argue the Commission standard is irrelevant, because "the national security agencies do not rely on Commission rules or precedents to assess whether SoftBank or Sprint are in operational control of Clearwire . . . ." But left unsaid in their

<sup>&</sup>lt;sup>3</sup> See Request of MCI Communications Corporation and British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended, *Declaratory Ruling and Order*, 9 FCC Rcd. 3960, 3962 (1994) (noting that measures "that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control" and considering instead whether a party possesses the "right to determine the policy that [the licensee] will pursue" or is in a position to "dominate the management of [the licensee's] corporate affairs").

<sup>&</sup>lt;sup>4</sup> Crest Financial Ltd., Petition for Reconsideration, ULS File No. 0005480932, at 7-8 (Jan. 4, 2013).

<sup>&</sup>lt;sup>5</sup> See, e.g., Stratos Global Corporation, Transferor, Robert M. Franklin, Transferee, Consolidated Application for Consent to Transfer of Control, *Memorandum Opinion and Order and Declaratory Ruling*, 22 FCC Rcd. 21328 (2007) (using an intervening, independent trust to insulate the beneficial owner of the licensee's shares).

<sup>&</sup>lt;sup>6</sup> See Letter at 3 (simply pointing to Clearwire's Opposition, filed in ULS File No. 0005480932 (Jan. 14, 2013)).

<sup>&</sup>lt;sup>7</sup> See Letter at 3.

Marlene H. Dortch June 11, 2013 Page 3



Letter is the fact that the CFIUS standard for control is a substantially lower bar than the Commission's and can capture entities that hold a "dominant minority of the total outstanding voting interest in an entity [or] board representation[.]" Sprint's interest in Clearwire goes beyond a dominant minority. It includes both an equity majority position and majority board representation. This means that, if SoftBank controls Sprint, it would control Clearwire, too, under the CFIUS standard.

Contrary to Sprint's and SoftBank's assertions, DISH's *de facto* control questions are not untimely. The national security significance of Sprint's control over Clearwire emerged only once it was disclosed that the NSA is premised on the assumption that Sprint lacks operational control over Clearwire today.

Finally, DISH's call for an examination of the question of control is not inconsistent with DISH's prior filings with the Commission. Previously, DISH had expressly stated that it "takes no position" on whether the Eagle River transaction gave Sprint *de facto* control over Clearwire. In a January 11 filing, DISH noted that "by its own admission" Sprint lacked both *de jure* and *de facto* control over Clearwire in order to point out that, based on Sprint's own position, the transaction was not of a type eligible for *pro forma* approval.

DISH urges the Commission to determine whether Sprint has *de facto* control over Clearwire today. If it does, then key national security concerns remain unaddressed.

Please contact the undersigned if you have any questions.

Sincerely,

\_\_\_\_\_\_/s/ Pantelis Michalopoulos Counsel for DISH Network Corporation

cc: Jacob Lew, Secretary, United States Department of the Treasury
Eric Holder, Attorney General, United States Department of Justice
Janet Napolitano, Secretary, United States Department of Homeland Security

<sup>9</sup> See DISH Reply to Opposition, ULS File No. 0005480932, at 7 n.22 (Jan. 29, 2013).

<sup>&</sup>lt;sup>8</sup> See 31 C.F.R. § 800.204(a).

<sup>&</sup>lt;sup>10</sup> DISH Petition for Reconsideration, ULS File No. 0005480932, at 6 (Jan. 11, 2013).